



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR2035/11

In the matter between:

SEKATANKA DANIEL SEBATI

Applicant

and

BIDSERV INDUSTRIAL PRODUCTS PTY

(Ltd) t/a G FOX & CO

First Respondent

COMMISSIONER THANDIWE TSHAYANA

Second Respondent

CCMA

Third Respondent

Date heard: 23 April 2015

Delivered: 7 August 2015

JUDGMENT

RABKIN-NAICKER J

- [1] This matter came before me as an opposed application for condonation for the late filing of a review application. The applicant received a copy of the arbitration award in question on 13 February 2011, although it was issued on 19 January 2011. The applicant launched his review application on the 25 August 2011. The period of

delay is excessive. The award found his dismissal fair on substantive grounds after the applicant, who had worked for the respondent company as a lorry driver since 1975, refused to obey an instruction to reload a truck. His refusal to do so followed an injury at work some days previously when he hurt a hand.

- [2] The transcript of the arbitration proceedings records the applicant's testimony regarding his manager's instruction to reload the truck:

"He began to shout at me and said that, "If you do not want to listen to my instructions I will dismiss you" and that is when I responded because he (inaudible) early in the morning, he was shouting at me, even after now when I was talking to me so that is when I responded to say, "You can dismiss me". That is when, because I was shouting, I was having a conversation with Mark Barnes, then that is when Mark, Martin, took me to the warehouse so that I could cool myself down because I was still angry."

- [3] The applicant did not seek reinstatement at arbitration but compensation for an alleged unfair dismissal. The applicant has explained the delay in launching the review in sketchy terms. However, he avers that the person who represented him at his arbitration (one Lehlokoa) told him on the 13 February 2011, after giving him a copy of the award, that his only remedy was to approach the Labour Court, and he suggested that applicant consult an attorney. The applicant describes his visit thus:

"It was on that day, about the 13 February 2011 on my way to collect my UIF benefits that I decided to via Mr Lehlokoa's office to enquire about the outcome of the arbitration proceedings held on 17 January 2011 seeing that I was not receiving any progress report from Mr Lehlokoa though I had given him my cell contact details."

- [4] He was doing piece jobs on the Reef at the time of the above visit. After that, he records that he was waiting on his brother to assist him financially, which assistance was not forthcoming. During May 2011, when visiting home in Limpopo, he was again advised to consult an attorney by an acquaintance (one Mampshika) who is himself an attorney. As his brother was not forthcoming with financial assistance, he went back to Mr. Mampshika in July 2011, who then explained to

him what a contingency fee agreement was and took him to his attorneys of record on 25 July 2011 for a consultation. There is no explanation as to why it took a further month for his attorney of record to launch the application.

- [5] It is trite that the onus is on the applicant to satisfy the court that condonation should be granted. In **Melane v Santam Insurance Co Ltd** 1962 (4) SA 531 (A) Holmes JA set out the applicable principles for a court in considering whether to grant condonation as follows:

'[T]he basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation.... What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.'

- [6] In **NUM v Council for Mineral Technology**¹, the LAC held that:

'There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.'

- [7] The above approach has been endorsed in a long line of LAC judgments.² In this matter the explanation for the delay cannot be considered as reasonable or

¹ [1999] 3 BLLR 209 (LAC) at 211G-H

² See in this regard *NUM & others v Western Holdings Gold Mine* (1994) 15 ILJ 610 (LAC) at 613E; *Zondi & others v President of the Industrial Court & another* [1997] 8 BLLR 984 (LAC) at 989E-F; *Mziya v Putco Ltd* (1999) 4 LLD 236 (LAC); [1999] 2 BLLR 103 (LAC) at 107A-C; *NEHAWU v Nyembezi* [1999] 5 BLLR 463 (LAC) at 456J-466A; *Waverley Blankets Ltd v D Ndimba & others*; *Waverley Blankets Ltd v Sithukuza & others* (1999) 20 ILJ 2564 (LAC) at para 11; *Mgobhozi v Naidoo NO & others* (2006) 27 ILJ 786 (LAC);

acceptable. The applicant himself has averred he was doing piece jobs on the Reef during the period and that he had a cell phone. Yet it appears he only sought to take any steps to further his case in May 2011 and July 2011 when visiting Limpopo. The months of March, April and June in their entirety are unexplained, while he refers to one meeting in May with Mr. Mampshika and makes a general averment that his brother's offer of assistance was not forthcoming which appears to be an explanation for the delay between May and July.

[8] On the basis of the above, there is no need to deal with the prospects of success in the review application. I note however that the grounds for review are not substantiated in the papers. There is a recitation of the standard grounds in the founding affidavit, and no supplementary papers dealing with the record. While one has sympathy with the applicant who had worked for the employer for a great number of years, it is not possible to come to his assistance on the papers before me.

[9] In all the circumstances, I make the following order:

Order

1. The application for condonation is dismissed.
2. There is no order as to costs.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: M.M Mahapa Attorney

For the First Respondent: B. Bleazard Attorney

LABOUR COURT